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APPLYING FOR ASYLUM

The Honorable Rose Collantes Peters*

As an immigration judge, many of the cases that I hear on a daily basis are asylum related cases. This essay addresses evidentiary issues that arise in an asylum hearing. At a minimum, what must occur in an asylum hearing is that the applicant for asylum testify. This may seem like a very basic issue, but in fact there are cases where people have lost because the applicant did not testify. I had a situation many years ago where a *pro per* applicant for asylum appeared in front of me with an application that seemed sufficient on its face. She swore under oath that the application was true and correct. The government attorney refused to question the respondent because she did not present any direct testimony in support of her application for asylum. The trial attorney eventually questioned the respondent briefly. I granted the asylum request and the Board reversed, tearing apart her written application for asylum which is what she primarily relied upon for asking for asylum relief. This case was an educational experience showing how important it is for an applicant to testify in support of her own application. As a result, now I ask the questions myself directly to unrepresented applicants.

Probably the most important issue in asylum hearings is credibility because most people rely primarily upon their own testimony to establish their claim for asylum. One of the first things the judges ask themselves is whether their story is inherently credible. You would be amazed at some of the stories which I hear that defy logic. For example, I have been told that people have escaped from prisons by jumping from three story high windows and upon landing, without injury, they were able to run and walk for hours. People have also told me that they escaped from prison by bending one inch diameter iron bars with their hands and then squeezing through the hole that they made. I found these stories to be inherently incredible.

* Judge Peters has served as an immigration judge since June 1, 1987. Her present assignment is to the bench at the Terminal Island Detention Facility in San Pedro, California.

Along with credibility, details are also very important in an asylum hearing. I had a case recently where the person testified consistently with their written application for asylum. Both the asylum application and testimony were detailed, but there was one detail that was missed by the applicant and his attorney. The applicant had testified that he had been incarcerated from December 1990 until May 1991 incommunicado from his wife and family. He also stated in another part of his hearing and in his written application for asylum that his wife had given birth to a full-term healthy baby, over seven pounds in weight in December of 1991. When he was confronted with the fact that his wife could not have conceived the child with him while he was incarcerated, his immediate explanation was that the baby must have been premature. When he was confronted with the fact that he had already stated that the baby was full-term and healthy and weighed over seven pounds, he then stated that his wife must have had an affair. I did not find his explanations credible in light of the rest of his testimony and I denied his case.

The other issue that the judge looks at is whether this applicant is consistent. Is his story consistent with his written application for asylum? Now, minor inconsistencies are not going to be sufficient to deny an application for asylum. If an applicant's written application, however, for asylum states, "I'm afraid to go back to my country because I'm afraid of the guerrillas" and then he testifies to fear of the government rather than the guerrillas that is a major inconsistency that must be addressed by the applicant for asylum. I had a case recently with someone who had been granted asylum in deportation proceedings in 1989. Subsequently, this person was convicted of a deportable crime, and was placed in deportation proceedings a second time. The second time he went before the judge he declined to apply for asylum and was deported to his country. He then reentered the United States, committed another offense and was arrested by Immigration from the jail and brought to me for deportation proceedings a third time. He decided this time that he was going to apply for asylum again. So I ordered his initial record of proceeding where he was granted asylum the first time and found that he originally claimed to be afraid to return to his country because he feared the government. In his second hearing before me, he said he didn't fear the government at all, but rather, he only feared the guerrillas. He could not explain why his two claims for asylum differed so dramatically. This was something I considered to be a major inconsistency and without explanation I denied his case.

Another important factor for the judge to look at is the demeanor of the applicant for asylum when testifying. Is the applicant evasive or

does he readily answer the questions? Does the applicant have a selective memory? Does he claim to have no knowledge of facts that he should normally be able to testify about? Is the testimony detailed and specific or is it conclusive? Keep in mind that judges hear cases everyday and we hear similar scenarios everyday. If it seems that we are sometimes pessimistic about the claims that we hear, it is because we have heard so many stories that are not facially credible. Sometimes it becomes impossible to believe a particular story that may seem very reasonable to an applicant. Usually, we have heard it before with a slightly different variation. I want to also point out that I do not take findings on credibility lightly. It is not something that I take pleasure in when I say in a decision that I found this applicant not credible. It is, however, something I must rule on when I am hearing a case. I feel that if the evidence supports a finding that the applicant is not credible then it is my duty to make an adverse credibility finding.

Supporting documents are often, in my experience, treated as optional in asylum cases when in fact the regulations and the cases indicate that if they are available they should be presented. Often applicants will come before me and make references to supporting documents that they have failed to bring to court. When the applicants are asked why the supporting documents were not presented, the typical answer is, "Well I did not think they would be important and I did not think you would want to see them." This is the same answer given by applicants who have attorneys. Apparently, the attorneys have not questioned the applicants for asylum about any supporting documents they may have.

Another problem is people who come to the airport without any documents or with fraudulent documents. We have no idea who this person is. Such a person will present supporting documents for his asylum case that do not establish his identity, but name him as the person that he now claims to be. For example, the applicant will bring in a newspaper article that says that someone with this name was incarcerated by the government. It is difficult to assess credibility and whether or not these supporting documents relate to the applicant, if the court has no evidence of identity. Sometimes we get applicants who claim to be leaders of well-established political organizations and yet they have no proof that they are who they say they are. They do not present any identification card, or letters from the organization verifying that this person is in fact their leader. If this is a structured (legitimate?) political organization the absence of this proof must be explained.

Another problem with supporting documents is the issue of authentication. Many times we get documents that are suspicious on their face.

For example, I will get photographs that look like they have been cut and pasted together, yet the applicant will tell me in no uncertain terms that these are genuine documents. In one case, the Immigration and Naturalization Service sent the suspect's photograph to their forensics laboratory which in turn confirmed that the photograph was a composite. The applicant's rebuttal to the forensic evidence was his own self-serving testimony that the photograph was genuine. His testimony under these circumstances was insufficient to authenticate the photograph.

I have also received written documents that purport to be foreign government documents with obvious erasures and substitutions on the documents. It is going to be difficult to authenticate a document under these circumstances simply with the self-serving testimony of the applicant for asylum. Many times people submit official documents from the government of their own country to support their case. The common objection that I hear is that the documents are not authenticated by the government as required by the regulations through the American consulate. I have not heard attorneys address this objection directly, rather, they usually argue that the regulations do not apply for technical reasons. Sometimes applicants submit evidence that the American consulate in their country will not authenticate documents. In any event, it is an issue that has to be addressed. I am unaware of any Board decisions that say that official documents do not have to be authenticated as the regulations require.

Sometimes people will submit letters which they are unable to authenticate from family members. In other words, they cannot confirm that the handwriting on the letter is that of their family member. I recently had a case with a man who submitted a letter from his wife and yet he could not confirm that the letter contained his wife's handwriting or signature. It would be very unusual for someone not to be familiar with his wife's handwriting and signature. If he is not he needs to present some evidence regarding why he is not familiar with it.

We also receive supporting witnesses at times. Sometimes the applicant will rely upon evidence that someone else knows about. For example, a local resident has been in contact with a relative in his home country and has found out about facts that have arisen since the applicant left his country. The applicant does not present that witness, but simply relies upon his memory of what the witness told him. I think it is very important that the witness be presented rather than relying on double hearsay. If the witness, however, is not presented, then an explanation should be provided as to why not and their declaration should be under penalty of perjury. Sometimes, the witness will contradict the

applicant for asylum and the attorneys fail to address the contradictions or clarify it through their applicant. The record is then left with the supporting witness contradicting the applicant on major issues. The natural tendency for a judge is to determine that the witness, if otherwise credible, rather than the applicant, is in fact telling the truth because the witness would have no reason to lie. I recently had a case where a mother came in to testify for her son who was applying for asylum. She informed me that she did not think that the government or the guerrillas in their country would harm him, persecute him, or arrest him. She negatively effected his application for asylum.

The other error that I frequently see is that the State Department letter is totally ignored. Sometimes the State Department will indicate that the situation presented by the applicant is not the typical scenario for persecution in his country. Yet the applicant will not submit background information which rebuts the State Department's opinion. I have seen the Board of Immigration Appeals (BIA) deny asylum because the State Department opinion contradicts the applicant's opinion. It also makes a difference to submit evidence of country conditions which supports the claim. Recently, in *Shirazi Parsa v. INS*,¹ the Ninth Circuit reversed the BIA decision. The Court found instead that the country reports supported the alien's claim that this was the typical fashion that his country persecuted people for political reasons. The Ninth Circuit found that they were unreasonable to determine that the persecution this person suffered was not on account of their political opinion. It is very important that an applicant submit background information with claim supporting portions highlighted. It is very helpful to the judge and very persuasive.

Finally, on precedent decisions, immigration judges are bound by decisions that are issued by the BIA. If a person's case appears to be controlled by a precedent decision in which asylum was denied, then it is very important to distinguish the facts of that person's case from the published decision. I have a lot of people who make claims for asylum and when I ask them how they would distinguish their cases from *Matter of T*, for example, they are unable to do so. I then deny the request for asylum because I am bound by precedent decisions.

1. 14 F.3d 1424 (9th Cir. 1994).